In the Supreme Court of the United States.

OCTOBER TERM, 1902.

THOMAS C. BEDFORD, APPELLANT,
v.
THE UNITED STATES.

EMMA BEDFORD, APPELLANT,
v.
THE UNITED STATES.

No. 277.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

These are appeals by the claimants from a judgment of the Court of Claims dismissing their petitions.

It appears from the record that prior to 1876 the Mississippi River flowed around a narrow point of land, known as De Soto Point, and by the city of Vicksburg in a southwestly direction. In the spring of 1876 the point became so narrow by erosion that the river broke through, leaving De Soto Point as an island and shortening the course of

the river by about 6 miles, with the result that the current of the river was thrown with great velocity and at an abrupt angle against the Mississippi bank of the river. The appellants owned certain land on the Louisiana side of the river, a number of miles below the cut-off thus formed. The current of the river was deflected from the Mississippi bank to the Louisiana bank of the river at a point somewhat above the lands of the appellants, causing the Louisiana bank of the river to be eroded to a great extent.

Another result of the cut-off was that the city of Vicksburg was left several miles from the main channel of the river, to the great damage of its commerce. The south side of the cut-off was further eroded by the action of the river, and the channel of the river was being continually farther removed from the city of Vicksburg.

In order to prevent further damage, the United States erected on the south side of said cut-off certain revetments which are described in Finding IV, the result of which was to prevent the further erosion of that point, and to hold the current of the river in its then position at Delta Point.

The court below also finds that the point of contact of the current of the river with the Louisiana bank gradually worked downstream until it reached the lands of the appellants and washed away those lands to the extent of 2,300 acres, and that ever since that time such lands have been completely submerged.

The court also found that if the revetments had not been constructed, the point of contact of the current on the Mississippi side would have worked south more rapidly, and consequently the point of contact on the Louisiana side would have moved southward more rapidly and would sooner have left the lands of the appellants, and in that event those lands would not have been eroded to the same extent. It is found that the rapidity of the changes and the lessening of the damage in the absence of the revetment are both conjectural.

The other significant facts found by the court are those in Findings IV, V, and VII, and may be summarized as follows:

The revetments were constructed on land entirely below the high-water mark of the river, and were not upon nor in contact with the lands of the appellants.

The United States in making said improvements did not recognize any right of property in the appellants in and to the right alleged to be affected, and did not assume to take private property in and by the construction of the revetments, but proceeded in the exercise of a claimed right to improve the navigation of the river.

The cause of the deflection of the current of the river onto the appellants' land was the cut-off, and the course of the river, as it then existed, was not changed by the revetments, but they operated to keep the direction of the current of the river at that point as it then was.

If the revetments had not been built, the injury to the appellants' land would have been decreased, but the extent of such decrease is conjectural.

The injury done to the appellants' land was an effect of natural causes which the Government interrupted.

The rapidity of the changes, and the extent thereof, in case the revetments had not been built, are also matters of conjecture.

Under these circumstances are the appellants entitled to recover the value of their lands?

ARGUMENT.

THE COURT OF CLAIMS HAD NO JURISDICTION.

The United States had a governmental right to improve the navigation of the Mississippi River by the constructions in question, and also a proprietary right in the bed of the stream, below low-water mark, upon which such constructions were placed, and having done no act to recognize the appellants' title, but simply having placed improvements on land it owned, no contract can be implied to pay for other lands, and therefore the Court of Claims was without jurisdiction.

It is the settled law of this court that the Court of Claims has no jurisdiction of an action sounding in tort.

Schillinger v. *United States*, 155 U. S., 161.
United States v. *Lynah*.

It is submitted that this is a case sounding in tort. This question of jurisdiction was fully presented in the court below. Although not in terms

discussing the question as a matter of jurisdiction, that court in effect held it had no jurisdiction when it concluded, upon a review of the whole case, that—

> Still the fact remains that the injury done was the effect of natural causes, from which no implied contract to pay therefor can arise. (Record, p. 18.)

If no contract could be implied, the court had no jurisdiction to award damages.

This question of jurisdiction in river-improvement cases has recently been before this court in the Lynah case, in which it is somewhat fully considered, and were it not of so grave importance it might be considered inadvisable to go over the matter again. There are, however, so many cases now pending in which the question must be decided, that it is thought to be a matter of profitable discussion until it be fully understood by all interested. There are cases, like the Lynah case, involving destruction of rice plantations; there are cases involving the claimed overflow of extensive tracts of land in the Mississippi Valley as a result of the levee system; there are cases involving the erosion of land on the Ohio River as a result of certain improvements there made; there are cases involving damages to lands in Galveston claimed to be the result of certain improvements there made. All these cases arise out of the policy of the United States in its improvement of navigation, and the question of jurisdiction and also the question of

liability, if there be jurisdiction, is involved in each. The question is important not only as bearing on the decision of these cases, but as bearing on the future action of Congress in the improvement of navigation. The question of what the nature and extent of liability are is one that may well influence that policy. These are the excuses for fully discussing this matter, if any be needed.

In nearly every case of this class the defense has been interposed that the Court ot Claims was without jurisdiction because the case sounded in tort. If it appears that private property has been taken, the defense has been successful or not, depending upon whether or not the United States has recognized that the property taken was private property or otherwise. Whether there has been such recognition has depended on a variety of circumstances in the varying cases, but the recognition of private ownership or the lack of such recognition has been the keynote of them all.

After reviewing the authorities it was said in the Lynah case:

> The rule deducible from these cases is that when the Government appropriates property which it does not claim as its own, it does so under an implied contract that it will pay the value of the property it so appropriates.

In the *Great Falls case* (112 U. S., 645) the principle was thus stated:

> In that view we are of the opinion that the United States, having by its agents, proceeding under the authority of an act of

> Congress, taken the property of the claimant for public use, are under an obligation, imposed by the Constitution, to make compensation. The law will imply a promise to make the required compensation where property to which the Government asserts no title is taken, pursuant to an act of Congress, as private property, to be applied for public uses.

The converse of this proposition is found in the *Langford case* (101 U. S., 341), in which it was said:

> It is a very different matter where the Government claims that it is dealing with its own and recognizes no title superior to its own. In such case the Government, or the officers who seize such property are guilty of a tort if it be in fact private property. No implied contract to pay can arise any more than in the case of such a transaction between individuals.

The findings in this case seem to clearly settle to which of the above classes this case belongs. Finding V is as follows:

> In making the improvement aforesaid the defendants did not recognize any right of property in the claimants in and to the right alleged to be affected, and did not assume to take private property in and by the construction of the revetment, but proceeded in the exercise of a claimed right to improve the navigation of the river. (Record, p. 11.)

By virtue of the above finding this is a case in which there was no recognition of the appellant's

or any other property rights, but, on the contrary, a claimed right on the part of the United States to do just what was done—a case in which the Court of Claims had no jurisdiction.

Beyond this it is submitted that the finding of the Court of Claims is justified by the facts that appear in this record if it were proper to question the accuracy of that finding. It does not appear that there was any communication whatever between the appellants and any officer of the United States. The land of the appellants was miles away from the revetment. There was no action of Congress except appropriations to carry on the work. It was said in the *Gibson case* (166 U. S., 272) that such appropriations by Congress are an assertion of a right to the property.

Furthermore, it might well be held if the United States undertakes to occupy property for purposes of such a character that it has no proprietary right whatever in such property actually improved nor in the property injuriously affected by the improvement, that a contract would be implied without more. Such in a measure is the Great Falls case. But there the improvement was a system of waterworks, to erect which the United States had no proprietary right whatever, but had to acquire it. The case is different where the United States without any action whatever has a beneficial interest in the property on which the improvement is placed. Under such circumstances it would

seem to be the presumption that the intention was to occupy only such property as it actually owned.

It has been settled by a long line of decisions of this court that the beneficial ownership of navigable waters in the United States and of the lands beneath such waters below the high-water mark is in the United States so far as such ownership is necessary for the regulation and improvement of navigation as incident to the regulation of interstate and foreign commerce. The Constitution of the United States vests in the United States not only the governmental right to improve navigation as a part of the governmental right to regulate such commerce, but also, so far as navigation goes, the proprietary right to the use of such property for such purpose. From such decisions the origin of such proprietary right seems evident. Navigable waters are and always have been the natural highways of commerce, travel, and communication. Unlike the other avenues and instrumentalities of commerce, they are not the work but the inheritance of man. They have been so regarded from the earliest times, and through all the evolution of the law regarding property rights. On account of their evident importance to the people in general, the ultimate governing power, the source of all property rights, has persistently refused to part with that portion of the beneficial ownership of such property which is necessary to insure its use to all the people. These property rights are not rights which have

been acquired by government, but rights which have always been retained by government whatever else may have been granted.

In *Shively* v. *Bowlby* (152 U. S., 1) Mr. Justice Gray elaborately discusses the subject. He says:

> In England from the time of Lord Hale, it has been treated as settled that the title in the soil of the sea, or of arms of the sea below ordinary high-water mark, is in the King, except so far as an individual or corporation has acquired rights in it by express grant or by prescription or usage; and that this title, *jus privatum*, whether in the King or in the subject, is held subject to the public right *jus publicum* of navigation and fishing.

The American colonies were claimed by England by the right of discovery and were subject to the same laws. Upon the Revolution these rights and titles passed to the people of the various States, and are now held by them, subject to the limitations placed upon them by the Constitution of the United States.

In *Martin* v. *Waddell* (16 Peters, 367), Chief Justice Taney said:

> When the Revolution took place, the people of each State became themselves sovereign, and in that character held the absolute right to all their navigable waters and the soil under them, for their own common use, subject only to the rights since surrendered by the Constitution to the General Government.

In *Weber* v. *State Harbor Commissioners* (18 Wall., 57), Mr. Justice Field said:

> Upon the admission of California into the Union upon equal footing with the original States, absolute dominion and sovereignty over all soil under the tide water within her limits passed to the State, with the consequent right to dispose of the titles to any part of such soils in such manner as she might deem proper, subject only to the paramount right of navigation over the waters so far as such navigation might be required by the necessities of commerce with foreign nations or among the various States, the regulation of which was vested in the General Government.

In *Illinois Central Railroad Company* v. *Illinois* (146 U. S., 387), Mr. Justice Field further said:

> It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters within the limits of the several States belong to the respective States within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of Congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the States.

Mr. Justice Gray also said, in *Shively* v. *Bowlby* (*supra*):

> And upon the American Revolution all the rights of the Crown and of Parliament vested in the several States, subject to the rights surrendered to the National Government by the Constitution of the United States.

In England these rights only extended to waters in which the tide ebbs and flows. This was the early doctrine of the United States, but this court, in the case of *Genesee Chief* v. *Fitzhugh* (12 How., 443), held that that test was not applicable, and that the true test was whether or not the waters were in fact navigable.

In *Scranton* v. *Wheeler* (179 U. S., 141), the right of a raparian owner to compensation for being deprived of access to navigable water was elaborately discussed and many authorities were reviewed in the prevailing opinion to show that such compensation was not due.

In the same case the dissenting opinion reviewed a large number of cases for the purpose of showing that the right of access to navigable waters is private property pertaining to riparian lands.

It was the judgment of the court, however, that, whether property or not in such a sense that it might be "taken," nevertheless the riparian owner was not entitled to compensation.

The dissenting opinion presents an irresistible array of authority to the effect that the right of access from riparian property to adjoining navi-

gable waters is property, and it is submitted that such contention is not at all inconsistent with the prevailing opinion in that case. If correctly understood, the prevailing opinion proceeded upon the ground, not that such right was not property in such a sense that it might be "taken," but upon the ground that the proprietary interest in such property to such extent was not in the riparian owner but in the United States.

Mr. Justice Harlan said (p. 163):

> So that whether the title to the submerged lands of navigable waters is in the State or in the riparian owners, it was acquired subject to the rights which the public have in the navigation of such waters. The primary use of the waters and the lands under them is for purposes of navigation, and the erection of piers in them to improve navigation for the public is entirely consistent with such use, and infringes no right of the riparian owner. Whatever the nature of the interest of a riparian owner in the submerged lands in front of his upland bordering on a public navigable water, his title is not as full and complete as his title to fast land which has no direct connection with the navigation of such water. It is a qualified title, a bare technical title, not at his absolute disposal, as is his upland, but to be held at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation. In *Lorman* v. *Benson*, above cited, the supreme court of

> Michigan, speaking by Justice Campbell, declared the right of navigation to be one to which all others were subservient. The learned counsel for the plaintiff frankly states that compensation can not be demanded for the appropriation of the submerged lands in question and that the United States, under the power to regulate commerce, has an unquestioned right to occupy them for a lawful purpose and in a lawful manner. This must be so—certainly in every case where the use of the submerged lands is necessary or appropriate in improving navigation.

It is at this point that the dissenting opinion disagrees from the prevailing opinion. After showing that such right of access is property, it assumes that it is the private property of the riparian owner.

Mr. Justice Shiras states the following proposition (p. 185):

> Now, if it be held that Congress has power to take or destroy private property lying under or adjacent to navigable streams, without compensating their owners, because it is done in the exercise of the power to regulate commerce, then it must follow that the same unlimited power can be exercised with respect to private property not in nor bounded by water. The power of Congress to regulate commerce is not restricted to commerce carried on in lakes and rivers, but equally extends to commerce carried on by land. If Congress, yielding to a loud and increasing popular demand [*that it*] should take possession and control of the

> railroads of the country, or should undertake the construction of new railroads as arteries of commerce, this novel notion, that the existence of the right to regulate commerce creates of itself and independently of the laws of the State a Federal servitude on all property to be affected by the exercise of that right, would apply to all kinds of private property wherever situate.

The answer to these propositions seems to be that property that is not in or bounded by water was freely parted with by the Government and no ownership was retained; that the Government never did own the railroads of the country, and consequently was never in a position to retain any beneficial ownership there, an ownership which possibly might have been retained if the Government had found them ready to its hand, as it did find the navigable waters of the country.

The prevailing opinion also expressly approved the holding in *Stockton* v. *Balt. and N. Y. R. R.* (32 Fed. Rep., 9–20), and the following language therein, which, on account of such approval, is here cited as of authority. The case involved the right to erect a bridge abutment on land submerged in navigable water, and the court said:

> But it is contended that if the United States can constitutionally take the land of the State, as well as that of the citizen, for public purposes without consent, it can only do so in the same manner and subject to the same conditions, namely, that of making

> just compensation. It is urged that the language of the fifth amendment of the Constitution is applicable to the case and is imperative. This language is, "Nor shall private property be taken for public use without just compensation." It is insisted that the property of the State in lands under its navigable waters is private property and comes strictly within the constitutional provision. It is significantly asked, "Can the United States take the statehouse at Trenton and the surrounding grounds belonging to the State and appropriate them to the purposes of a railroad depot, or to any other use of the General Government, without compensation?" We do not apprehend that the decision of the present case involves or requires a serious answer to this question. The cases are clearly not parallel. The character of the title or ownership by which the State holds the statehouse is quite different from that by which it holds the land under the navigable waters in and around its territory.

The court then expounded the doctrine laid down in the cases above cited, to the effect that the land under navigable waters belongs to the State, but is subject to an easement in favor of the Federal Government for the purposes of navigation. The court also held that no compensation could be exacted. The only ground of this holding was that Congress was simply using its own property which it had always possessed, although it had not until that time had occasion to employ it.

In *Gilman* v. *Philadelphia* (3 Wall., 725) it was said:

> For this purpose they [navigable waters] are the public property of the nation and subject to all the requisite legislation of Congress.

The language of these cases is not consistent with the position that the only right the United States has to navigable waters and the lands under them is a governmental right to control them through the right of appropriating private property by paying therefor. Such rights would not have been discussed in such language. Such statements are not to be found in discussions of the power of the United States to use other kinds of property, as, for instance, land for post-offices, arsenals, etc. It has the governmental right to appropriate all property, but such right has never been described in the language used to describe the measure of its rights in navigable waters.

These rights of navigation and its regulation constitute part of the eminent domain of the United States. The eminent domain consists not only of the right to appropriate private property for public use upon just compensation, but it also includes many rights of a public nature which the Government already possesses without any affirmative action. This distinction is often lost sight of, but is important.

Mr. Cooley says:

> The rights of which we here speak are considered as pertaining to the State by virtue of an authority existing in every sovereignty and which is called the eminent domain. Some of these are complete without any action on the part of the State, as is the case with the rights of navigation on the seas, lakes, and public rivers, the rights of fisheries in public waters, and the right of the State to the precious metals which may be mined within its limits. Others only become complete and are rendered effectual through the State displacing, either partially or wholly, the rights of private ownership and control, and this it accomplishes either by contract with the owner, by accepting his gift, or by appropriating his property against his will through an exercise of its superior authority.

And further:

> And as there is not often occasion to speak of the eminent domain except in reference to those cases in which the Government is called upon to appropriate property against the will of the owners, the right itself is generally defined as if it were restricted to such cases, and is said to be that superior right of property pertaining to the sovereignty by which the private property acquired by citizens under its protection may be taken without regard for the wishes of its owners. More accurately, it is the right and authority which exists in every sovereignty to con-

> trol and regulate those rights of a public nature which pertain to its citizens in common, and to appropriate and control individual property for the public benefit, as the public safety, necessity, convenience, or welfare may demand.
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> Constitutional Limitations, p. 643.

In the case at bar the United States exercised its right of eminent domain in controlling and using property which it already possessed, and not in any manner in taking private property which it did not possess. It was simply claiming its own. The cases cited abundantly establish the proposition that the United States already had such ownership in the property it used for improving the navigation of the river; that it might do so without compensating anybody therefor.

It is submitted that where the United States proceeds in the exercise of a legitimate governmental right to construct improvements on property which it actually owns, such actual improvements being confined to such property, there is no implied contract to pay for other property which is injuriously affected or entirely destroyed as a result of such improvements, although the United States takes no action either recognizing or disputing the title to such other property. Such conditions can not arise in cases in which the improvement is a post-office or custom-house or a system of waterworks, as in the Great Falls case, for there the United States has no proprietary right when it starts in. It has no property

to improve, but must acquire it. In such circumstances if the United States takes possession of private property without actually disaffirming the owner's title, it may be reasonable to hold that a contract must be implied. But if the United States builds a post-office or custom-house on land it has previously purchased and confines the actual improvement to such land, it seems inadmissible to hold that it is doing anything except using property it owns, although as a matter of fact the result may be that other property is destroyed.

In *Schillinger* v. *United States* (155 U. S., 163), it appeared that the United States had accepted from one Cook certain pavement in the Capitol grounds, which pavement was covered by a patent owned by Schillinger. It was evident that the United States had the property and was using it. There had been no recognition or denial of Schillinger's right, except such as might be implied from the fact that the pavement was purchased from Cook. It was held that no contract could be implied. In the case at bar there was no denial or affirmance of the appellant's rights, except such as can be implied from the claim of the United States that the property it was using belonged to it, a fact that would negative any recognition of appellant's rights fully as much as the fact in the Schillinger case that the United States dealt with Cook and not with Schillinger. A claim of title in the United States is fully equal to a claim of

title in a person from whom the United States purchases. But in the Schillinger case the court said:

> Here the claimants never authorized the use of the patent right by the Government; never consented to but always protested against it, threatening to interfere by injunction or other proceedings to restrain such use. There was no act of Congress in terms directing, or even by implication suggesting, the use of the patent. No officer of the Government directed its use, and the contract which was executed by Cook did not name or describe it. There was no recognition by the Government or any of its officers of the fact that in the construction of the pavement there was any use of the patent, or that any appropriation was being made of claimant's property. The Government proceeded as though it were acting only in the management of its own property and the exercise of its own rights and without any trespass upon the rights of the claimants. There was no point in the whole transaction, from its commencement to its close, where the minds of the parties met or where there was anything in the semblance of an agreement. So not only does the petition count upon a tort, but also the findings show a tort. That is the essential fact underlying the transaction and upon which rests every pretense of a right to recover. There was no suggestion of a waiver of the tort or a pretense of any implied contract until after the decision of

> the Court of Claims that it had no jurisdiction over an action to recover for the tort.

Moreover, the legislative appropriations for the purpose of improving navigation and the consequent improvement thereof are an assertion of a right to make such improvements without compensation. It was said in the Gibson case:

> The legislative authority for these works consisted simply of an appropriation for their construction, but this was an assertion of a right belonging to the Government, to which riparian property was subject, and not of a right to appropriate private property, not burdened with such servitude to public uses (p. 276).

It can not be held that the action of the United States in this case was anything but an assertion of a right to do what it did do without compensation. Any other holding would be inconsistent with the language above quoted.

The statute (25 Stat., 94) authorizing the Secretary of War to condemn or purchase property necessary for use in improvement of navigation has been referred to in the Lynah case as in some way indicating a recognition of the right to compensation in this class of cases. It is submitted that that statute is of no force as either recognizing or denying the right of the appellants. There are many cases in which it may be necessary to condemn property for the improvement of navigation, as, for instance, property for levees or locks above high-water mark. The statute in question

but gives such right to the Secretary of War. It does not follow that it is exercised in every case in which it might be. Before the statute was enacted the authority existed in Congress. Why does its transfer to the Secretary of War affect the matter?

THE UNITED STATES IS NOT RESPONSIBLE FOR THE CAUSES OF THE DESTRUCTION OF APPELLANTS' PROPERTY.

The only element of a "taking" such as was found by this court in the Pumpelly and Lynah cases, relied upon as authority by the appellants in the discussion of this case, that appears in the findings of the Court of Claims, is the fact that the land of appellants was destroyed by the causes specified in such findings; but there are other elements which go to make up a taking of private property which were present in those cases and are not present in these. In those cases the improvements made by the United States directly caused the appropriation of the land. The United States set in motion the forces that destroyed the property in those cases. They were both cases in which the damage was caused by the erection of dams, resulting in a flooding of the property which would never have occurred had the dams not been erected. The cases at bar are very different. The force that caused the damage was not set in motion by the United States. It was an operation of natural law that set such force in motion. The court below found as a fact:

> The injury done to the claimants' land was an effect of natural causes; the injury

> caused by the Government was by interrupting the further progress of natural causes, i. e., the further change in the course of the river. (Record, p. 12.)

If these forces had not been interrupted a lesser portion of appellants' land would have been destroyed; how much less no one can tell. It seems to be a question not so much of appellants' property rights in the land which was destroyed as of their property rights in the continuance of the forces of nature. Did the appellants have such a proprietary interest in the continuation of such forces as to give them a right to damages if those forces are interrupted? This is a difficult question to answer in the affirmative. The court below laid considerable stress on this phase of the situation, saying:

> The claimants were deprived of their lands by natural causes, and if any injury was added thereto by the acts of Government it was consequential and the extent thereof is conjectural. (Record, p. 17.)

And further that court said:

> Hence we must hold that though the injury to the claimants' lands might have been diminished in course of time by further erosion and the consequent shifting of the channel had the revetment not been built, still the fact remains that the injury done was the effect of natural causes, from which no implied contract to pay therefor can arise. (Record, p. 18.)

The United States did not undertake to appropriate any property, but simply to preserve the property intrusted to its care; that is, the commercial interests of the city of Vicksburg. Those interests were suffering more and more, and such damage would have continued. Is it possible that the Government must refrain from protecting the interests intrusted to it, simply because if it did not protect them some other property would suffer to a less degree? Must the United States suffer a navigable stream to recede farther and farther from an important port because by preventing it some one's property is inundated?

The riparian owner at Delta Point unquestionably would have had the right to erect the improvement which the United States erected for the purpose of protecting his land from the inroads of the river; and this on the principle that a riparian owner may preserve the existing conditions at his property, although he may not erect constructions which will change those conditions. Subject to this limitation, he may preserve his property irrespective of the consequences to his neighbors.

It would seem that the same principle will apply to the United States in its protection of the property interests intrusted to its care.

In Angell on Water Courses (7th ed., sec. 333) it is said:

> A riparian proprietor may in fact legally erect any work in order to prevent his lands being overflowed by any change of the

natural state of the river, and to prevent the old course of the river from being altered.

The case of *Barnes* v. *Marshall* (68 Cal., 569) is in point. It there appeared that a water course had been gradually encroaching upon the defendant's land and had eroded it and caused it to cave into the river. If allowed to continue the erosion would have increased and the river would have formed a new course through the land. To prevent such action the defendant erected a bulkhead of the former height of the bank. Had the bulkhead not been erected it appeared that the changes in the river would have been such that the plaintiff's land would have been relieved of danger. The court held that the defendant was well within his rights, as he did not change the existing state of affairs. It was said:

> It therefore appears that the contention of plaintiff is that the defendant can not reconstruct his bank, washed off by the river, to such a height as the bank formerly stood, and thereby prevent the river from running through his land, which last, if permitted, would, by shortening the stream, take the water off the plaintiff's bank and render his land less liable to overflow. And he claims that the river must be permitted, without obstruction, to change its current, even if thereby it cut a new channel through and over the defendant's land.
>
> This position is not tenable.
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> The defendant had a right to protect his land from a threatened change of the river's

channel by building a bulkhead as high as was his original bank before it washed off. He thereby took no right from the plaintiff; he simply attempted to maintain his own. (Angell on Water Courses, sec. 333.)

"A riparian proprietor may, in fact, legally erect any work to prevent his lands from being overflowed by any change in the natural state of the river, and to prevent the old course of the river from being altered." (*Farquharson* v. *Farquharson*, 3 Bligh Pr. N. S., 421, 422.)

According to the findings, the pond left from the high water on defendant's land was not a channel of the river, but only threatened to become so, which defendant was seeking to prevent. And this he had a right to do, if he did not thereby interfere with the ancient channel of the river. (Angell on Watercourses, sec. 108.)

In *Gulf Railroad Co.* v. *Clark* (101 Fed. Rep., 678), the railroad company had built an embankment for its road on land some distance from the bank of the Canadian River in the Indian Territory. The river gradually encroached up to the embankment and finally washed part of the embankment away. Thereupon the company constructed dikes some distance into the then position of the river, but on land over which the river had encroached. The dikes not only protected the company from further encroachment, but restored part of the land already lost. Clark claimed the dikes resulted in the destruction of 90

acres of his land. The court held he could not recover, and Judge Sanborn, speaking for the circuit court of appeals for the eighth circuit, said:

> When the dikes were constructed the channel of the river had been gradually changing toward the west, until it encroached upon the west bank a long distance, and the construction of the dikes necessarily changed the channel from its later location back to the position in which it was originally found. That was the purpose of their construction. While it is well settled that a riparian owner has no right to obstruct the natural channel of a river so as to divert the current of the river from its natural course, the true rule is that, when the river encroaches upon his land, he may take the necessary steps and use the necessary means to restore it to its original channel, to maintain his bank in its original condition, and to that extent at least to protect his property from the incursions of the water. The charge of the court impinged upon this rule of law, because it instructed the jury that the railway company could not under any circumstances protect itself or its own bank to the prejudice of the opposite proprietor. The restoration of a river to its original channel and the maintenance of one of its banks in its original channel and natural condition may often be to the prejudice of the riparian owners upon the other side of the stream, both in times of high and low water. But a riparian owner upon the westerly bank of

a stream is not required to sit in silence until his property is swept away by an encroaching river, because his preservation of it may increase the depth of the water in the channel, and cause an injury to the owner of the opposite bank, which he would not have suffered if the water had been permitted to carry away the westerly bank. He had the right to protect his property against such encroachments, and when they have occurred and the current of the stream has turned over his land he has the right to restore it to its original channel. Any injury sustained by the owner of the opposite bank through such action is *damnum absque injuria*, and can only be avoided by his exercise of the same right to protect his own bank. A riparian owner may construct the necessary embankments, dikes, or other structures to maintan his bank of the stream in its original condition, or to restore it to that condition, and to bring the stream back to its natural course; and, if he does no more, riparian owners upon the opposite or upon the same side of the stream can recover no damages for the injury his action causes them. *Farquharson* v. *Farquharson*, 3 Bligh Pr. N. S., 421, 422; *Rex* v. *Sewer Com'rs*, 8 Barn & C., 355; *Lamb* v. *District* (Cal.), 14 Pac., 625; *Hoard* v. *City of Des Moines* (Iowa), 17 N. W., 527; Ang. Watercouses, 333; *Barnes* v. *Marshall* (Cal.), 10 Pac., 115; *Taylor* v. *Fickas*, 64 Ind., 167; *Turnpike Co.* v. *Green*, 99 Ind., 205; *York Co.* v. *Ralls*, Can. Law T., Feb., 1900.

There are many cases involving the question of changes in the channels of rivers, and they are not all in accord, but none of them, so far as discovered, disputes the proposition here laid down to the effect that a riparian proprietor has the right to preserve existing conditions irrespective of consequences.

If, then, the United States had this right, it certainly can not be held that by exercising it there was a taking of the private property of the appellants for which compensation must be made.

THE DAMAGE IS TOO REMOTE TO CONSTITUTE A TAKING.

This court has declared in *Transportation Company* v. *Chicago* (99 U. S., 642), and reiterated the declaration in *Gibson* v. *The United States* (166 U. S., 273), that the Pumpelly case marks the extremest qualification of the doctrine that there is no liability for damages resulting to private property from the proper exercise of governmental powers when such property is not directly encroached upon. The facts in the Pumpelly case, then, may be taken to mark the boundary between direct and indirect injury to private property from public improvement of navigable waters. But those facts show that as a *direct* result of the construction of a reservoir for the improvement of navigation on the stream along which lay the land of the claimant, that land was permanently flooded and rendered entirely useless to the claimant. That is to say, in the words of Justice Strong in the

Transportation Company v. *Chicago*, "there was a physical invasion of the real estate of the private owner, and a practical ouster of his possession." These facts were held by the court to constitute a "taking," although there was no appropriation of the land for public use in the ordinary sense. There was, however, an appropriation to this extent—that the reservoir of water created by the public improvement of the stream rested upon land of the claimant. As it was obviously necessary to the creation of the reservoir that it should have land to rest upon, it is reasonable to say that this was an appropriation of the land for that purpose. Such an appropriation does not seem to differ essentially in character from the taking of a piece of land as a site for a public building—to rest the structure upon. So, then, we have in the extremest case of "taking" private property for public use in the public improvement of navigable waters, a direct taking and appropriation of the land of a private owner by and through such improvement. It would seem to follow, therefore, that there can be no recovery in any case in which there is not shown to be an equally direct taking and appropriation. That is to say, it must appear that, as a direct and necessary part of the scheme or plan of the public improvement of navigable waters, the land of the private owner is in some manner taken and appropriated in the course of such work for the purpose of carrying on or completing the same. Failing this, there can be no

recovery, even though as an indirect result of such public improvement the real estate of a private owner is injured even to the extent of practically destroying the same.

There are several cases decided by this court more or less analogous to the cases at bar in which no recovery was had because the damages were consequential, and therefore *damnum absque injuria*. Those cases seem to be decided upon the character of the damage inflicted.

In *Gibson* v. *United States* (166 U. S., 269) and *Scranton* v. *Wheeler* (179 U. S., 141) it was held that the deprivation of access to and from navigable waters was consequential damage.

In *Transportation Company* v. *Chicago* (99 U. S., 635) it was held that a temporary interruption of access to property by municipal improvements was consequential damage.

In the cases at bar the nature of the damage is such as to distinguish them from the cases cited, but there is the other consideration that here the damage is not the direct and proximate result of the action of the United States. The damage is too remote. As already pointed out, the United States was not the direct cause of this injury. A natural force was interrupted which in its turn readjusted itself to the new conditions, and in so doing caused a conjectural amount of injury to the appellants. The damage did not directly flow from the acts of the United States, and, therefore,

those acts are not the direct and proximate causes of the damage.

THE DAMAGES ARE NOT PROVEN AND CAN NOT BE.

The findings do not disclose the amount of land that would have been destroyed in the absence of the improvements in question, nor the amount that would have been saved to the appellants, but specifically show that it can not be determined. The extent of damages is not capable of proof; it is conjectural. There is consequently a failure of proof and of findings sufficient to entitle the appellants to any judgment, and further than this it is evident that such findings can not be supplied. It is the burden of the appellants to prove their cases and if they can not do so it is their misfortune.

Damages that are speculative and conjectural in their nature can not be recovered. In the case of *Howard* v. *Stillwell Co.* (139 U. S., 199), this court in discussing the question of expected profits as an element of damages for breach of contract, in stating several reasons why they could not be recovered, said:

> In the greater number of cases such expected profits are too dependent upon numerous uncertain and changing contingencies to constitute a definite and trustworthy measure of actual damages.

In *Central Trust Co.* v. *Clark* (92 Fed. Rep., 293), Judge Sanborn, speaking for the circuit court of

appeals for the eighth circuit, in summarizing the principles relating to damages, said:

> Damages which are the natural and probable result of a breach of contract, and which may be reasonably anticipated therefrom, but which are so speculative and so dependent upon numerous and changing contingencies that their amount is not susceptible of proof with any reasonable degree of certainty, may not be recovered. (*Howard* v. *Mfg. Co.*, 139 U. S., 205–210, and cases cited; *Cahn* v. *Tel. Co.*, 40 Fed., 40).

It is submitted that the causes and extent of the injury done the appellants are too speculative and indefinite to form the basis of an implied contract to pay as for a taking of private property.

The judgment of the Court of Claims should be affirmed.

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